

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 10 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROGELIO DE LA CRUZ CEDA,

Petitioner,

v.

MERRICK B. GARLAND, Attorney
General,

Respondent.

No. 21-1099

Agency No.
A074-410-662

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted June 28, 2023**
Pasadena, California

Before: SMITH, N.R., LEE, and VANDYKE, Circuit Judges.

Rogelio De La Cruz Ceda, a native and citizen of Mexico, seeks review of the Board of Immigration Appeals' (BIA) order denying his motion to reopen removal proceedings. We have jurisdiction under 8 U.S.C. § 1252, and review for abuse of discretion. *Singh v. Holder*, 658 F.3d 879, 885 (9th Cir. 2011). We

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

deny in part and dismiss in part the petition.

1. The BIA did not abuse its discretion in denying De La Cruz Ceda's untimely motion to reopen. A motion to reopen must be filed within 90 days of the entry of the final order of removal but he did not file his motion until two years after the final order had been issued. 8 C.F.R. § 1003.2(c)(2).

De La Cruz Ceda argues, however, that the BIA should have equitably tolled the deadline because of ineffective assistance of counsel. "To qualify for equitable tolling on account of ineffective assistance of counsel, a petitioner must demonstrate (a) that he was prevented from timely filing his motion due to prior counsel's ineffectiveness; (b) that he demonstrated due diligence in discovering counsel's fraud or error; and (c) that he complied with the procedural requirements of *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988)." *Singh*, 658 F.3d at 884.

He has not met any of the three requirements to equitably toll the deadline for the motion to reopen.

First, De La Cruz Ceda failed to establish that he was prevented from timely filing his motion to reopen because of his prior counsel's ineffective assistance. His motion and accompanying declaration allege that his prior counsel failed to present evidence that was "material to his case," including: (1) that he was a victim of domestic violence at the hands of his ex-wife; (2) that he had custody of his children pursuant to a court order and took them to therapy on a weekly basis; (3) that he was married to a U.S. citizen who was a cancer

survivor; and (4) that he had an approved I-130 based on his marriage to a U.S. citizen. But none of the evidence justifies why it took De La Cruz Ceda over two years to file his motion. *See id.* (noting that to qualify for equitable tolling based on ineffective assistance of counsel, a petitioner must demonstrate he was prevented from timely filing his motion due to prior counsel's ineffectiveness).

Second, because De La Cruz Ceda does not state when he discovered his prior counsel's error, the BIA correctly determined that it could not assess whether De La Cruz Ceda exercised "due diligence" in discovering it. *See id.* (noting that to qualify for equitable tolling based on ineffective assistance of counsel, a petitioner must demonstrate he exercised due diligence in discovering prior counsel's fraud or error).

Third, De La Cruz Ceda failed to comply with the procedural requirements of *Lozada*. *See id.* (noting that to qualify for equitable tolling based on ineffective assistance of counsel, a petitioner must generally demonstrate he complied with the procedural requirements of *Lozada*). Under *Lozada*, a party alleging ineffective assistance must: "1) submit an affidavit explaining his agreement with prior counsel regarding his legal representation, 2) present evidence that prior counsel has been informed of the allegations against her and given an opportunity to respond, [and] 3) either show that a complaint against prior counsel was filed with the proper disciplinary authorities or explain why no such complaint was filed." *Iturribarria v. I.N.S.*, 321 F.3d 889, 900 (9th Cir. 2003). The BIA correctly noted that De La Cruz Ceda failed to present evidence that he informed

his prior counsel of his allegation of ineffective assistance or that he filed a complaint against his prior counsel as required by *Lozada*. See *Tamang v. Holder*, 598 F.3d 1083, 1090–91 (9th Cir. 2010).

We also cannot excuse his failure to strictly comply with the *Lozada* requirements because the counsel’s error is not plain from the record. See *Salazar-Gonzalez v. Lynch*, 798 F.3d 917, 920 n.2 (9th Cir. 2015) (“Strict compliance with *Lozada* is not always necessary for equitable tolling.”). De La Cruz Ceda argues that the BIA could have potentially granted relief had his attorney advised the agency that he became married to a U.S. citizen before his final hearing.¹ But it is not plain from the record when De La Cruz Ceda told his counsel about his marriage, so we cannot assess whether his lawyer actually provided ineffective assistance of counsel.

2. We lack jurisdiction to review the BIA’s decision that De La Cruz Ceda’s case does not present an “exceptional situation” meriting sua sponte reopening under 8 C.F.R. § 1003.2(a). See *Bonilla v. Lynch*, 840 F.3d 575, 588 (9th Cir. 2016) (noting we may review an agency’s decision to decline sua sponte reopening only for “legal or constitutional error”).

Petition DENIED in part and DISMISSED in part.

¹ The BIA incorrectly stated that De La Cruz got married “after his final hearing.” The record reflects that De La Cruz got married after the evidentiary record was closed but before his final hearing.